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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 332

FENELON BOESCHE, ADMINISTRATOR, ETC.,
PETITIONER,

vs.

STEWART L. UDALL,
SECRETARY OF THE INTERIOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 14, 1962
CERTIORARI GRANTED NOVEMBER 5, 1962

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,238

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, Deceased,
Appellant,

v.

STEWART L. UDALL, Secretary of the Interior,
Appellee

Appeal from the United States District Court for the District of Columbia

---

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, Deceased,
Plaintiff

vs.

FRED A. SEATON, Secretary of the Interior, United States Department of the Interior,
Defendant

Civil No. 2463-59

RELEVANT DOCKET ENTRIES

1959

Sept. 4—Complaint, Appearance, Exhibits 1, 2 & 3.

Oct. 13—Answer of deft to complt.

1960

Sept. 16—Motion of deft for summary judgment, P. & A.

Sept. 16—Statement of deft of Material facts.

Oct. 20—Motion of pltff for summary judgment, P. & A.

Oct. 28—Opposition of deft. to pltf's motion for summary judgment.

Nov. 23—Findings of fact and conclusions of law.
Judgment granting deft's motion for summary judgment; denying pltf's cross-motion for summary judgment and entering judgment for deft vs pltf and dismissing complaint.

1961

Jan. 19—Notice of Appeal by pltf. Deposit by Hoffman $5.00

Feb. 10—Consent order substituting Stewart L. Udall as deft in place of Fred A. Seaton.

(Complaint and exhibits all filed September 4, 1959)

• • • •

COMPLAINT

FOR REVIEW, FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

The Plaintiff for his complaint represents as follows:

1. That the Plaintiff is a citizen of the United States and is the Administrator of the Estate of F.W.C. Boesche, deceased, duly appointed and qualified under the laws of the State of Oklahoma.

2. That the Defendant is the Secretary of the Interior of the United States, and as such is charged with the administration of the laws governing public domain lands of the United States, including the Act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. Sec. 181, *et seq.* The official residence of the Defendant is the District of Columbia.

3. That the matter in controversy, exclusive of interests and costs is in excess of $3,000.00.

4. That the jurisdiction of this court is invoked under Title II, Section 306 of the District Code, and upon the further ground that the application, construction and interpretation of the Federal Constitution and Federal statutes are involved and required. Plaintiff seeks relief under provisions of Section 10 of the Administrative Procedures Act, and under the terms of Title 28, U.S.C., Secs. 2201, 2202, relating to Declaratory Judgments. The court also has jurisdiction by virtue of its inherent power to grant injunctive relief in the premises.

5. That the Plaintiff brings this suit to protect the interests of the Estate of F. W. C. Boesche, deceased, in noncompetitive oil and gas lease bearing serial number

New Mexico 027951 and hereinafter referred to as the Boesche lease. The heirs at law in said estate are Elizabeth M. Boesche, widow; Maxine B. McCorkle, daughter; Adele R. Boesche, daughter; David M. Boesche, son; and Fenelon Boesche, son. Said lease was issued under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, as amended, 30 U.S.C. 226) for lands in the public domain of the United States situated in the state of Oklahoma, more particularly described as follows:

Indian Meridian, Oklahoma, T. 22 N., R. 16 W.,
Sec. 21, W½NW¼, containing 80 acres

6. That this case involves defendant's arbitrary, capricious and unlawful action in holding for cancellation of oil and gas lease New Mexico 027951 issued to F. W. C. Boesche, November 15, 1957, for an alleged violation of a Departmental regulation, 43 CFR 192.42(d), which provides that a lease may not be issued for less than 640 acres except when the land is surrounded by land not available for leasing.

7. That Lease New Mexico 027951 was issued to F. W. C. Boesche, who was the first qualified applicant therefor, November 15, 1957, effective December 1, 1957, pursuant to a lease offer filed in the United States Land Office at Santa Fe, New Mexico on or about September 11, 1956, and that the official records of the Interior Department show that the following events have occurred in connection with said lease:

(a) That a junior lease offer filed on or about September 11, 1956 by Vincent Cuccia and George E. Conley for the same land as that included in the Boesche lease offer, together with an adjoining tract, which offer was assigned serial number New Mexico 027952, was rejected by the Manager of the Local Land Office in a decision dated January 24, 1958. A copy of the decision is attached hereto as Exhibit 1 and made a part hereof.

(b) That Cuccia and Conley filed an appeal from said decision of the Manager dated January 24, 1958, and in a decision dated January 9, 1959, the Director of the Bureau of Land Management reversed the Manager's decision, and the Boesche lease, New Mexico 027951, was held for cancellation. A copy of this decision is attached hereto as Exhibit 2 and made a part hereof.

(c) That prior to his death on July 12, 1959, F.W.C. Boesche filed an appeal from the January 9, 1958 decision of the Director and on August 5, 1959, A-27997, the Deputy Solicitor of the Interior Department acting under delegated authority from the Secretary of the Interior affirmed the order of cancellation. A copy of the decision is attached hereto as Exhibit 3 and made a part hereof.

(d) That under the Rules of Practice of the Department of the Interior, Title 43 Code of Federal Regulations, Part 221, the administrative remedies available to the Plaintiff have been exhausted.

8. That lease New Mexico 027951 was issued to a qualified applicant under authority of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. Sec. 181, *et seq.* and the provisions in that law authorizing cancellation of a lease are limited. In 30 U.S.C. 188 it is set forth that any lease issued under the Mineral Leasing Act after August 21, 1935, may be cancelled by the Secretary only upon failure of the lessee to comply with any of the provisions of the lease. There has been no violation of any of the terms of the Boesche lease. The Secretary of the Interior has no authority to administratively cancel any public domain oil and gas lease which has been validly issued. In view of this lack of authority, the Secretary's attempt to cancel was arbitrary, capricious and unlawful.

9. That under Departmental regulation 43 CFR 192.42 (d) a lease offer may not be for less than 640 acres, except

where the land is surrounded by land not available for leasing. The land included in the Boesche lease was within the meaning of this exception. The only public domain land contiguous to lease New Mexico 027951 was the NW¼SW¼ Section 21, T. 22 N., R. 16 W., Ind. M., which was then included in a prior oil and gas lease offer New Mexico 018806, filed April 14, 1955, and for which a lease was issued effective December 1, 1956, one year prior to the date the Boesche lease was effective. The Interior Department concedes that where a lease is issued on the basis of an offer filed in violation of this regulation, there is no requirement of law that the lease be canceled.

10. That on the date the Boesche lease offer was filed, the NW¼SW¼ section 21, T. 22 N., R. 16 W., Ind. M., was included in a valid subsisting lease offer for which a lease was issued long before the Boesche lease was issued. The land was not subject to inclusion in a lease based on any offer that might have been filed by Boesche on the date his lease offer was filed or at any subsequent date.

That therefore the Boesche application met the Departmental regulation 43 CFR 192.42(d), as the adjoining 40 acres of land was embraced in the prior valid application New Mexico 018806 for which a lease was duly issued. Inclusion thereof in the Boesche lease offer would have been a useless act serving no valid purpose.

11. That even if it is conceded for the purposes of this argument that 43 CFR 192.42(d) was not complied with, no cancellation action would lie, as the Land Office Manager as the Secretary's delegate has the power to waive, and did waive any regulatory defect in an application upon his issuance of the oil and gas lease.

12. That the regulations in 43 CFR 192.42(d) as applied to the circumstances here involved deprive the

appellant of a vested right and constitute an attempt on the part of the Secretary of the Interior to exercise powers beyond the scope of his delegated powers. Such action is a usurpation of legislative authority and is ineffective. His power to prescribe rules and regulations to carry out the intent and purpose of the law is not the power to make law. His regulations may not expand or extend the provisions of the statute or add to the conditions of a right a condition not stated in the law. A regulation which is inconsistent with the provisions of a statute is void. See 8 F. Supp. 315; affirmed 185 F. 2nd 781; reversed in part (not related to above) 71 S. Ct. 684, 341 U.S. 321, 95 L. Ed. 968. See also *United States* v. *United Verde Copper Company*, 196 U.S. 207, wherein the court held:

> "But there is amore absolutely fatal objection to the regulation (Rule 7). (*Viz.* Rule 7 which provides no timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.) The Secretary of the Interior attempts by it to give authoritative and final construction of the Statute. This, we think, is beyond his power . . . If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. Such power is not regulation; it is legislation."

13. That the Defendant be restrained *pendente lite* from cancelling oil and gas lease New Mexico 027951 and from issuing oil and gas lease New Mexico 027952 in order to preserve the status quo of these cases pending determination of this law suit. The Plaintiff alleges on information and belief that neither of such actions has as yet been taken, and that the restraining order is necessary to prevent the taking of any such action which might be seriously detrimental and damaging to the Plaintiff in that it might result in possible loss of jurisdiction of this court to adjudicate the issued involved herein.

WHEREFORE, Plaintiff prays:

1. That Defendant be restrained and enjoined, *pendente lite* from cancelling oil and gas lease New Mexico 027951,

2. That Defendant be restrained from issuing oil and gas lease New Mexico 027952,

3. That the court review the action of the Defendant in accordance with the provisions of the Administrative Procedures Act (5 U.S.C. 1009).

4. That it be declared and adjudged that no authority exists for cancellation of oil and gas lease New Mexico 027951, for failure of the original lease offer to include a contiguous parcel of land for which a valid lease offer was filed, and which has since been included in oil and gas lease New Mexico 018806,

5. That the Defendant pay to Plaintiff the costs of this action,

6. That Plaintiff have such other and further relief as is just and equitable.

LEWIS E. HOFFMAN
800 Sheraton Building
711 - 14th Street, N.W.
Washington 5, D. C.
Tel: DIstrict 7-9840

JOHN F. DEEDS
311 Western Union Building
1405 G Street, N.W.
Washington 5, D. C.
Tel: Metropolitan 8-1647

DISTRICT OF COLUMBIA: SS

Lewis E. Hoffman, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff herein, that the plaintiff is a resident of Tulsa, Oklahoma, and is absent from the District of Columbia, that affiant read the foregoing complaint by him subscribed and that he knows the contents thereof and that the matters and things therein stated he verily believes to be true.

/s/ Lewis E. Hoffman

Subscribed and sworn to before me this 3rd day of September 1959.

/s/ Eleanor M. Haight
Notary Public

(SEAL)

EXHIBIT NO. 1

NM 027952(Okla)
Oil and Gas
4.10f

Land Office
P. O. Box 1251
Sante Fe, New Mexico

January 24, 1958

Certified Mail
Return Receipt Requested

DECISION

OIL AND GAS

VINCENT CUCCIA and GEORGE E. CONLEY

Offer To Lease Rejected

Offer to lease NM 027952 (Okla) is hereby rejected in its entirety for the following reasons:

> All of the lands involved in this offer are included in oil and gas lease NM 027951 (Okla) which issued effective December 1, 1957 following an application filed on September 11, 1956 at 10:01 a.m. NM 027952 (Okla) filed on September 11, 1956 at 10:20 a.m.

The right to appeal to the Director, Bureau of Land Management is allowed in accordance with information in the attached form 4-1366 made a part hereof, and the regulations contained in form 4-1364, a copy of which is also attached.

/s/ Douglas E. Henriques
DOUGLAS E. HENRIQUES
Manager

Attachments
REMartinez:mam

EXHIBIT NO. 2

Cancellation

SYLLABUS

The first qualified applicant for land available for oil and gas leasing has a statutory preference right to a lease, if a lease is to be issued for the land, which must be honored, and where a lease has been issued in derogation of that statutory preference right, that lease will be cancelled.

Vincent Cuccia et al., New Mexico 027952 and 027951 (January 9, 1959)

EXHIBIT NO. 2

In reply refer to:
New Mexico 027952
027951
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 9, 1959

Certified Mail
Return Receipt Requested

DECISION

OIL AND GAS

VINCENT CUCCIA and GEORGE E. CONLEY,
Appellants

F.W.C. BOESCHE

Manager's Decision Reversed

Messrs. Cuccia and Conley have appealed to the Director from a decision of the Manager, Land Office, Santa

Fe, New Mexico, dated January 24, 1958, rejecting their noncompetitive oil and gas lease offer, New Mexico 027952, filed under sec. 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 226). The offer was rejected for the reason that it conflicted with issued lease New Mexico 027951 (effective December 1, 1957), issued to F. W. C. Boesche, pursuant to offer filed September 11, 1956.

The appellants filed their lease offer on September 11, 1956. They show that the offer, pursuant to which the lease was issued to Boesche was not a proper offer under 43 CFR 192.42(d) because the offer was for less than 640 acres and not within the exceptions provided in that regulation. They contend, since their offer was the first proper offer for the lands described, that the Boesche lease should be cancelled and that a lease for the lands described in their offer should be issued to them.

Lease offer, New Mexico 027951, when filed, described less than 640 acres and did not comply with the pertinent regulation, 43 CFR 192.42(d). The offer when filed, should have been rejected. *Natalie Z. Shell,* 62 I.D. 417 (1955).

The appellants, being the first to file a proper lease offer for the lands involved, and being otherwise qualified, acquired a statutory preference right to a lease, if a lease for the lands was to be issued, which must be honored. 30 U.S.C., sec. 226; *C. T. Hegwer et al.,* 62 I.D. 77, 80 (1955). It follows that lease New Mexico 027951 was issued in contravention of law and in derogation of the rights of the appellants. Therefore, lease New Mexico 027951 is held for cancellation.

Mr. Boesche is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations. In the absence of an

appeal the lease will be cancelled without further notice to Mr. Boesche.

When this decision becomes final the case record will be returned, through the Bureau's State Supervisor at Santa Fe, New Mexico, for further processing of the appellants' application, and for issuance of a lease pursuant thereto, all else being regular.

If an appeal is taken by Mr. Boesche, then the adverse parties to be served are:

George E. Conley
Vincent Cuccia
Post Office Box 247
Ontario, California

/s/ Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. F. W. C. Boesche (Certified Mail)
Messrs. George E. Conley and Vincent Cuccia
(Regular Mail)

Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1

WJ
47754

EXHIBIT NO. 3

57705-59

SYLLABUS

F. W. C. BOESCHE

A-27997 Decided Aug. 5, 1959

Oil and Gas Lease: Applications—Oil and Gas Leases: Cancellation

An oil and gas lease is properly held for cancellation where it was issued pursuant to an application for less than 640 acres which did not include adjoining lands available for leasing at the time when the application was filed, as required by regulation, and where a subsequent, acceptable application was pending when the lease was issued.

EXHIBIT NO. 3

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of the Secretary
Washington 25, D. C.

New Mexico 027951

Oil and gas lease held for cancellation.

Affirmed.

A-27997

F. W. C. BOESCHE

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

F. W. C. Boesche has appealed to the Secretary of the Interior from a decision of January 9, 1959, by the Direc-

tor of the Bureau of Land Management which held for cancellation the appellant's oil and gas lease New Mexico 027951 issued as of November 15, 1957, on 80 acres of land described as the W½NW¼ sec. 21, T. 22 N., R. 16 W., Indian Meridian, Oklahoma. The Director's decision held that the appellant's lease offer was defective and that the issuance of the lease did not accord with section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., Supp. V, sec. 226).

The appellant's application for lease was filed on September 11, 1956, on which date a 40-acre tract (the NW¼ SW¼ sec. 21, T. 22 N., R. 16 W., Indian Meridian) which adjoins, on the south, the 80 acres in the appellant's lease, was included in oil and gas offer New Mexico 018806, filed on April 14, 1955, by Thomas Connell. A lease was issued to Connell effective December 1, 1956, on this 40-acre tract.

On September 21, 1956, Vincent Cuccia and George E. Conley filed oil and gas lease offer New Mexico 027952 for the 80 acres now covered by the appellant's lease and also the above-described 40-acre tract now leased to Connell. On January 15, 1957, Cuccia and Conley withdrew their application as to the 40-acre tract leased to Connell effective December 1, 1956. By decision of January 24, 1958, the manager of the Santa Fe land office rejected the application of Cuccia and Conley on the ground that all of the land for which they applied was leased to the appellant. The Director's decision in this proceeding reversed the manager's decision of January 24, 1958.

By departmental regulation (43 CFR 192.42(d) and 43 CFR, 1958 Supp., 192.42(d)) an offer for a noncompetitive lease must include an area of not less than 640 acres except upon a showing that the land applied for is in an approved unit plan, or where the land is surrounded by

lands which are not available for leasing.[1] An offer to lease for less than 640 acres which is not within one of these exceptions must be rejected and affords the applicant no priority (43 CFR 192.42 (g)(1)).

In a number of decisions the Department has held that lands are available for leasing within the meaning of 43 CFR 192.42(d) even though they are covered by an outstanding oil and gas lease application (*Natalie Z. Shell*, supra, fn. 1; *R. S. Prows*, 66 I.D. 19 (1959); *Frank Perew, Jr., et al.*, A-27915 (May 19, 1959)). Accordingly, the above-described NW¼SW¼ sec. 21 should have been included in the appellant's offer to lease, and as it was not, the offer should have been rejected (*Frank Perew, Jr., et al., supra; R. S. Prows, supra*). The Department has also held that an oil and gas lease which is issued pursuant to an application for less than 640 acres which did not include adjoining lands available for leasing when the application was filed must be canceled where a subsequent, acceptable application was pending when the lease was issued (*R. S. Prows, supra*).

None of the matters asserted on appeal provides a basis for distinguishing the instant case from the cited decisions. The appellant's assertion that there is no requirement that a lease be canceled by reason of an administrative error is not well taken. Section 17 of the Mineral Leasing Act, as amended, requires that if a noncompetitive oil and gas lease is issued, it must be issued to the first qualified applicant therefor. The provision grants a statutory preference right to the first qualified applicant and a lease issued in violation thereof contravenes the statute and departmental regulations referred to above and must be canceled. (*R. S. Prows, supra*, and cases cited therein).

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[1] A third exception is where the equivalent of the rule of approximation applies. *Natalie Z. Shell*, 62 I.D. 417 (1955).

Accordingly, the decision holding the appellant's lease for cancellation and directing issuance of a lease on the land to the first qualified applicant for a lease was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

(Sgd) Edmund T. Fritz
Deputy Solicitor

(Filed October 13, 1959)

• • • •

ANSWER

The defendant by his attorney, Thos. L. McKevitt, Attorney, Department of Justice, for his answer says:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The applicants Vincent Cuccia and George E. Conley, who the defendant has determined are entitled to a lease (New Mexico 027956), are indispensable parties.

Third Defense

I

Defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations in paragraph 1.

II

Defendant admits the allegations in paragraph 2.

III

Defendant admits the allegations in paragraph 3.

IV

Defendant says that the allegations in paragraph 4 are conclusions of law.

V

Defendant is without information sufficient to form a belief as to the truth or falsity of the allegations in the first two sentences in paragraph 5. Defendant admits the allegations in the last sentence in that paragraph.

VI

Defendant denies the allegations in paragraph 6.

VII

With respect to paragraph 7, defendant admits that lease New Mexico 027951 was issued to F.W.C. Boesche as of November 15, 1957, but denies that F.W.C. Boesche was the first qualified applicant. At the time F.W.C. Boesche applied for his lease on September 11, 1956, he failed to comply with the applicable regulation set out in 43 C.F.R. 192.42(d) which provides that an application to lease public lands must be for not less than 640 acres, except where the land is surrounded by lands not available under the act. The Boesche lease application covered the 80 acres of land described in paragraph 5 of the complaint but failed to include a contiguous 40-acre tract which at the time the application was filed was available for leasing, although included in an earlier filed application to lease. Defendant admits the remaining allegations in paragraph 7.

VIII

Defendant denies the allegations in paragraph 8, except the allegation that lease New Mexico 027951 was purportedly issued pursuant to the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended. The provisions of 30 U.S.C. 188 permit the Secretary to cancel a nonproducing lease for failure of the lessee to comply with the lease provisions. This specific grant of authority to cancel for noncompliance with the lease provisions, however, does not affect the defendant's basic authority in the course of an administrative appeal to cancel a lease which has been erroneously issued.

IX

With respect to paragraph 9, defendant admits the allegations in the first and third sentences and denies the allegations in the second and fourth sentences.

X

With respect to the allegations in the first sentence in paragraph 10, defendant admits that on September 11, 1956, the date the Boesche lease offer was filed, the NW¼SW¼, sec. 21 T. 22 N., R. 16 W., Ind. M., was included in a lease offer filed on April 14, 1955, by a third party, and that on December 1, 1956, a lease covering the described 40 acres was issued on the basis of that offer. Defendant denies the remaining allegations in paragraph 10.

XI

Defendant denies the allegations in paragraph 11.

XII

Defendant denies the allegations in paragraph 12.

XIII

The allegations in paragraph 13 constitute a demand for the issuance of a temporary restraining order, which allegations are meaningless in the absence of an appropriate motion.

WHEREFORE, defendant demands that the complaint be dismissed and that he be awarded his costs.

• • • •

THOS. L. MCKEVITT
Attorney, Department of Justice

(Filed September 16, 1960)

• • • •

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, by his attorney, Thos. L. McKevitt, Attorney, Department of Justice, moves for summary judgment of dismissal on the ground that the complaint fails to state a claim upon which relief can be granted.

This motion is based on the pleadings and, in particular, on the material appearing as Exhibit No. 3 to the complaint.

THOS. L. MCKEVITT
Attorney, Department of Justice
Attorney for Defendant

• • • •

(Filed October 20, 1960)

• • • •

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, by his attorney, moves the Court for summary judgment, pursuant to Rule 56 F. R. (Civ.) P., in accordance with the relief sought in the complaint. This motion is based on the following grounds:

1. There is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law.

2. The material facts are established by the allegations of the complaint and by the admissions of the answer.

Respectfully submitted,

/s/ Lewis E. Hoffman
Attorney for Plaintiff

• • • •

(Filed November 23, 1960)

• • • •

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having been submitted on cross-motions for summary judgment, accompanied by statements of material facts pursuant to local court Rule 9, the Court hereby makes findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. A regulation of the Secretary of the Interior relating to administration of the Mineral Leasing Act of 1920, as originally promulgated on June 17, 1952 (43 C.F.R. sec. 192.42(d)), reads, in part, as follows:

> • • • Each offer must be for an area of not more than 2,560 acres except where the rule of approxi-

mation applies, and may not be for less than 640 acres except in any one of the following instances:

(1) Where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan which has been approved as to form by the Director of the Geological Survey.

(2) Where the land is surrounded by lands not available for leasing under the act, except that where the tract was isolated as the result of a partial relinquishment of a lease, no lease offer will be received for the relinquished land other than one filed under the conditions prescribed in subparagraph (1) of this paragraph for a period of 60 days from and after the date of filing of the partial relinquishment.

As amended by Circ. 2017, 24 F.R. 4141, on May 22, 1959, the regulation reads (43 C.F.R. (1960 Supp.) sec. 192.42 (d)), in part, as follows:

* * * An offer may not include more than 2,560 acres except where the rule of approximation applies. The lands in the offer must be entirely within an area of six miles square or within an area not exceeding six surveyed sections in length or width. No offer may be made for less than 640 acres except where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan which has been approved as to form by the Director of the Geological Survey, or where the land is surrounded by lands not available for leasing under the act.

2. On August 5, 1959, the Secretary of the Interior affirmed a decision of the Director, Bureau of Land Management, holding for cancellation oil and gas lease New Mexico No. 027951 issued to the plaintiff as of November 15, 1957, covering 80 acres of public lands in Oklahoma. The Secretary held that the plaintiff's lease offer was defective in that it violated the provisions of the above-quoted regulation. The Secretary concluded that, for this reason, the plaintiff was not the first qualified appli-

cant for the lease within the meaning of 30 U.S.C. sec. 226.

3. Plaintiff's application for a lease covering 80 acres of public lands (the W½NW¼, sec. 21, T. 22 N., R. 16 W.) was filed on September 11, 1956. On that date a 40-acre tract of public land (the NW¼SW¼, sec. 21, T. 22 N., R. 16 W.) adjoining the 80 acres described in plaintiff's application was not under lease but was included in oil and gas application New Mexico 018806 filed on April 14, 1955, by one Thomas Connell. These two tracts were surrounded by lands not available for leasing under the Mineral Leasing Act.

4. At a later hour on September 11, 1956, Vincent Cuccia and George E. Conley filed oil and gas lease offer New Mexico 027952 for the same 80 acres covered by the plaintiff's application and also for the above-described 40-acre tract. Effective December 1, 1956, a lease on the 40-acre tract was issued to Connell. Thereafter, a lease covering the 80 acres was issued to the plaintiff by the Manager of the Santa Fe Land Office as of November 15, 1957. By decision of January 24, 1958, the Manager rejected the application of Cuccia and Conley on the ground that the land for which they applied was already leased to the plaintiff.

5. An appeal from this denial was taken to the Director, Bureau of Land Management, who reversed the Manager's decision on the ground that the plaintiff's application was not in accordance with the regulation in that it had failed to include all land available for leasing at the time the application was filed. The Director ordered that the Boesche lease be held for cancellation and that a new lease be issued to Cuccia and Conley. The Director's action was affirmed by the Secretary of the Interior in an opinion dated August 5, 1959. This suit followed. Because of the pendency of this litigation, the Manager has not yet acted on the directive that the Boesche lease be cancelled.

CONCLUSIONS OF LAW

1. The regulation of the Secretary of the Interior set out in 43 C.F.R. sec. 192.42(d) is addressed to and reasonably adapted to enforcement of the Mineral Leasing Act of 1920.

2. An applicant for an oil and gas lease under the Mineral Leasing Act of 1920 is not the first qualified applicant when, in applying for lands in an area where less than 640 acres of public lands are available, he fails to include in his application all of the public lands that are available even though some part of such lands may be included in a pending lease application filed by a third party.

3. In awarding a public lands oil and gas lease to the first qualified applicant, the Secretary of the Interior may cancel or direct the cancellation of a lease covering the same lands erroneously issued by a subordinate to another applicant.

4. The defendant is entitled to judgment.

/s/ GEORGE L. HART, JR.
Judge
United States District Court

• • • •

(Filed November 23, 1960)

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JUDGMENT

This matter having come on for hearing on defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment, and it appearing that there is no

genuine issue of fact and that defendant is entitled to judgment as a matter of law,

IT IS ORDERED, as follows:

1. The defendant's motion for summary judgment is granted.

2. The plaintiff's cross-motion for summary judgment is denied.

3. Judgment is entered in favor of the defendant and against the plaintiff, and the complaint is dismissed.

Dated this 23rd day of November, 1960.

/s/ George L. Hart, Jr.
Judge
United States District Court

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(Filed January 19, 1961)

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NOTICE OF APPEAL

Notice is hereby given this 19th day of January, 1961, that the Plaintiff, Fenelon Boesche, Administrator of the Estate of F. W. C. Boesche, deceased, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of November, 1960, in favor of the Defendant.

/s/ Lewis E. Hoffman
Attorney for Plaintiff

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[fol. 27] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16238

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased, Appellant,

v.

STEWART L. UDALL, Secretary of the Interior, Appellee.

Appeal from the United States District Court for the District of Columbia.

OPINION—Decided November 16, 1961

Mr. Lewis E. Hoffman for appellant.

Mr. Harold S. Harrison, Attorney, Department of Justice, with whom Assistant Attorney General Clark, Messrs. Roger P. Marquis and Thomas L. McKevitt, Attorneys, Department of Justice, were on the brief, for appellee.

Before Edgerton, Prettyman, and Bazelon, Circuit Judges.

Per Curiam: Appellee's predecessor as Secretary of the Interior issued to appellant's predecessor Boesche a noncompetitive oil and gas lease on 80 acres of public land. [fol. 28] After the Boesche application was filed, Cuccia and Conley filed an application which complied fully with the law and the regulations. The Secretary directed the cancellation of Boesche's lease and the District Court, we think correctly, sustained his action.

By §17 of the Mineral Leasing Act[1] a noncompetitive lease must be issued to the first applicant who qualifies.

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[1] 49 STAT. 677 (1935), as amended, 30 U.S.C. §226 (1958).

The Secretary is authorized to make rules and regulations.[2] To promote efficient exploitation of mineral deposits on unproven lands,[3] the Secretary requires by regulation that an application must cover at least 640 acres, with two exceptions, one of which is "Where the land is surrounded by lands not available for leasing under the act . . . ."[4] We agree with the District Court that this is a reasonable and valid regulation.

"Not available for leasing" may well mean, not available for leasing *to anybody*. Accordingly the Secretary "has always considered lands covered only by an outstanding application to be available for leasing." Natalie Z. Shell, 62 I.D. 417, 419 (1955). This interpretation is reasonable and we should not reject it.[5] In interpreting "an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). When [fol. 29] Boesche filed his application, an adjoining 40-acre tract had been applied for but not leased. Since that tract was "available for leasing" the Boesche application was insufficient.

Although the Secretary's interpretation of his regulation had "general applicability and legal effect", it was not necessary to publish it in the Federal Register.[6] "The function of filling in the interstices of the Act should be performed, as much as possible, through . . . quasi-legislative promulgations of rules . . . . But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

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[2] 41 STAT. 450 (1920), 30 U.S.C. §189 (1958).

[3] Annie Dell Wheatley, 62 I.D. 292 (1955).

[4] 17 F.R. 5615 (June 21, 1952), as amended, 43 C.F.R. 192.42(d) (1961 Supp.).

[5] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140; *Western Union Telegraph Co.* v. *United States*, 2d Cir. 1954, 217 F. 2d 579, 581.

[6] 49 STAT. 501 (1935), as amended, 44 U.S.C. §305(a) (1958).

This court has held that the Secretary not only has authority to cancel a lease issued on a defective application but may be required to do so. *McKay* v. *Wahlenmaier*, 96 U.S.App.D.C. 313, 226 F. 2d 35 (1955). Cf. *Hawley* v. *Diller*, 178 U.S. 476, 495.

Affirmed.

[fol. 30] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

Civil 2463-59

No. 16,238

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased, Appellant,

v.

STEWART L. UDALL, Secretary of the Interior, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Prettyman, and Bazelon, Circuit Judges.

JUDGMENT—Dated November 16, 1961

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

[fol. 31] [File endorsement omitted]

[fol. 32]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,238

[Title omitted]

PETITION FOR REHEARING IN BANC—
Filed November 30, 1961

Appellant, Fenelon Boesche, Administrator of the Estate of F. W. C. Boesche, deceased, respectfully petitions the Court, pursuant to Rule 26 of this Court, for a rehearing in the above entitled cause by the entire Court sitting in banc.

The Per Curiam opinion of this Court in the instant case upholds the Secretary's administrative cancellation of appellant's oil and gas lease New Mexico 027951 which was issued to the late F. W. C. Boesche on December 1, 1957.

[fol. 33] A rehearing in this case by the entire bench of the Court is merited for the following reasons:

(1) The Per Curiam opinion of this Court in the instant case involves fundamental questions regarding the authority of the Secretary of the Interior to cancel administratively oil and gas leases issued by the Department and is clearly in conflict with a previous decision of this Court in *Bell Oil & Gas Company* v. *Wilbur*, 60 App. D.C. 256, 50 F. 2d 1070 (1931).

(2) The Per Curiam opinion of this Court in the instant case is contrary to the holding of the Supreme Court of the United States in *Youngstown Company* v. *Sawyer*, 343 U.S. 579 (1951).

The Department Has No Authority to Cancel Appellant's Lease Administratively. The Department Has Not Complied With the Procedure Specified by Law for the Cancellation or Forfeiture of Leases.

The provisions of the Mineral Leasing Act authorizing the cancellation of oil and gas leases are contained in paragraphs one and two of Section 31 of the Mineral Leasing Act, as amended, which provides as follows:

Paragraph 1

> "Sec. 31. Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States District Court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, or the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions, thereof. (Feb. 25, 1920, c. 85, §31, 41 Stat. 450, 30 U.S.C. 188.)"

[fol. 34] *Paragraph 2*

> "Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after 30 days' notice *upon the failure of the lessee to comply with any of the provisions of the lease*, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . . . Aug. 8, 1946, c. 916, §9, 60 Stat. 956, 30 U.S.C. 188." (Emphasis supplied.)

Thus, Section 31 specifically provides two distinct procedures for forfeiture and cancellation of oil and gas leases, one judicial and the other administrative. And, Congress expressly limits the authority of the Secretary to cancel a lease administratively to instances when there has been a

"failure of the lessee to comply with any of the provisions of the lease * * *." Congress decreed that the cancellation of a lease for any other cause must be by judicial proceedings brought in the appropriate court, as provided in the first paragraph of Section 31, *supra*.

Cancellation by judicial proceedings was the only method of cancellation authorized by the Congress until 1946, when Congress saw fit to add the second paragraph to Section 31 (60 Stat. 956, 30 U.S.C. 188) authorizing the Secretary to cancel a lease administratively where the lessee fails to comply with lease provisions. The Congressional intent to limit the cancellation authority of the Secretary to instances where there has been a breach of lease provisions by the lessee is clear and explicit.

It is one thing to derive authority to cancel the lease administratively from general language in a statute when the statute is silent on the subject of cancellation; it is beyond dispute, however, that when the Congress has by statute provided specific procedures whereby such action may be taken, the administrative agency cannot ignore the means provided by the Congress and attempt to achieve the same or similar results by another method of its own choice. *Youngstown Company* v. *Sawyer*, 343 U.S. 579 (1951).

[fol. 35] Paraphrasing the remarks of Justice Brandeis in *Wallace* v. *Cutton*, 298 U.S. 229, 237, the language of Section 31 is clear and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said in *Isclin* v. *United States*, 270 U.S. 245, 250-51, "The Statute was evidently drawn with care: its language was plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect an enlargement of it by the court, so that what was omitted * * * may be included within its scope. To supply omissions transcends the judicial functions." The authority of the Secretary to cancel leases administratively "is limited by the scope of the statute." *Federal Communications Commission* v. *American Broadcasting Company*, 347 U.S. 284. He "may not extend a statute or modify its provisions." *Campbell* v. *Galeno Chemical Company, et al.*, 281 U.S. 599.

In the case of *Bell Oil & Gas Company* v. *Wilbur*, 60 App. D.C. 256, 50 F. 2d 1070 (1931), this Court held unequivo-

cally that the Secretary had no authority to cancel oil and gas leases except as expressly provided in the Mineral Leasing Act. In that case, this Court said: "The Secretary, under the terms of the Act, has no power by his own fiat to cancel these leases. He is required to go into the District Court of the United States to accomplish that result by a proceeding in equity."

More recently, the United States Circuit Court of Appeals, Tenth Circuit, held in the case of *Pan American Petroleum Corporation* v. *Ed Pierson, Supervisor for the State of Wyoming, Bureau of Land Management, Department of the Interior, et al.*, 284 F. 2d 649 (1960), that the Secretary has no statutory authority to administratively cancel an oil and gas lease after its issuance *except for the lessee's breach of the lease provisions*. The Court stated in part, at page 654:

> "* * * the Government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the lease premises. Similarly, the issuance of a patent is the last act of the government in disposing of the non-mineral lands of [fol. 36] the public domain. *Upon the performance of this last act, administrative power to annul or cancel ends and judicial power begins. The difference between a patent and an oil and gas lease is no reason for the denial of the power of administrative cancellation of a patent and for the recognition of such power to cancel a lease, unless Congress in the exercise of its authority over the public lands has provided for such administrative cancellation of leases after issuance.* The only provisions of this nature in the Mineral Leasing Act and its amendments, of which we are aware, relates to administrative cancellation of non-producing oil and gas leases issued after 1935 *for breach of lease provisions*, and that has no application here because cancellation is sought for fraud in procurement, not for breach of any lease provisions." (Emphasis supplied.)

and at p. 655:

> "The Secretary of the Interior has no powers except those granted or necessarily implied from granted powers. * * * * The courts have repeatedly held that he is without power to annul a patent once it has issued. That power is reserved to the courts. *In the absence of some statutory provisions giving him the power to annul leases under the Mineral Leasing Act, that power is also reserved to the courts.* * * * *." (Emphasis supplied.)

The government's Petition for Writ of Certiorari in the *Pan American* case was denied by the Supreme Court on May 29, 1961.

In the interest of a uniform administration of the Mineral Leasing Act, as amended, the cited conflict between the decisions of this Court should be removed. For all of the foregoing reasons, appellant respectfully urges that this petition for a rehearing in banc be granted.

Lewis E. Hoffman, Suite 404, 711 14th Street, N. W., Washington 5, D. C.;
Leon BenEzra, 810 18th Street, N. W., Washington 6, D. C.,
Attorneys for Appellant.

[fol. 37] Certificate of Counsel

We, Lewis E. Hoffman and Leon BenEzra, attorneys for appellant Fenelon Boesche, do hereby certify that the foregoing petition for rehearing in banc is presented in good faith and not for delay.

Lewis E. Hoffman, Leon BenEzra, Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 38] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1961

No. 16,238

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased, Appellant,

v.

STEWART L. UDALL, Secretary of the Interior, Appellee.

Before: Wilbur K. Miller, Chief Judge, and Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER GRANTING THE PETITION FOR REHEARING IN BANC AND VACATING THE JUDGMENT ENTERED NOVEMBER 16, 1961—Dated February 21, 1962

Upon consideration of appellant's petition for a rehearing en banc, it is

Ordered by the court that the petition for a rehearing en banc be, and it is hereby, granted and that this case shall be reheard by this court en banc at such date as the business of the court will permit.

It is Further Ordered by the court that the judgment entered herein November 16, 1961, be, and it is hereby, vacated.

Per Curiam.

[fol. 39] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,238

[Title omitted]

Before: Wilbur K. Miller, Chief Judge, and Edgerton, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, sitting in banc.

ORDER REINSTATING THE NOVEMBER 16, 1961 JUDGMENT—
Dated June 15, 1962

The court in banc having granted appellant's petition for rehearing in banc on February 21, 1962, and the appeal having been reheard by the court in banc, and the court in banc now being of the view that the judgment of the division of this court should be reinstated,

It is Ordered by the court in banc:

(1) that the order entered February 21, 1962, granting the petition for rehearing in banc and vacating the judgment of the division entered November 16, 1961, is hereby set aside;

(2) that the petition for rehearing in banc is hereby denied; and

(3) that the judgment of the division entered herein November 16, 1961, is hereby reinstated.

Per Curiam.

The case was reheard in banc prior to Senior Circuit Judge Prettyman's retirement from active service and was submitted to him on the briefs and recorded argument, but he did not participate in the foregoing order.

[fol. 40] Designation of Record (omitted in printing).

[fol. 41] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 42]

SUPREME COURT OF THE UNITED STATES

No. 332, October Term, 1962

FENELON BOESCHE, Administrator, etc., Petitioner,

vs.

STEWART L. UDALL, Secretary of the Interior.

ORDER ALLOWING CERTIORARI—November 5, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted limited to the question presented by the petition which reads as follows:

"Whether the Secretary of the Interior has authority under Section 31 of the Mineral Leasing Act, as amended, to cancel oil and gas leases by administrative action, for failure to comply with the Department's regulations."

The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.